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No. 85-65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SHANGHAI POWER COMPANY,

Petitioner,

vs.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. Petitioner raises the question, expressly reserved in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), whether the Government's extinguishment of its national's claim against a foreign government is a Fifth Amendment taking. The Government has advanced no valid ground for denying the petition for certiorari. It simply presumes, without support from any judicial precedent or scholarly authority, that the exercise of the claims settlement power is immune from the restraints of the Just Compensation Clause. The validity of that presumption, however, is ultimately for this Court to decide; the Government's restatement of its position is no justification for denying review of the constitutional issue.

The Government also attempts to obscure the taking issue by alleging that the claim of petitioner Shanghai Power Company

("SPC") is without value. This argument tacitly concedes the taking question raised in the petition but seeks to assure the Court that denial of the petition is appropriate because the Government has more than fully compensated SPC for the value of its claim. The Government's assertions concerning the question of just compensation are not only irrelevant to the taking issue but are also without any basis in the record. Both courts below assumed that SPC's claim was worth more than the payments SPC expects to receive under the Executive Agreement. Speculation as to the value of SPC's property affords no ground to avoid the taking question.

THE TAKING ISSUE

2. The Government's assertion (Opp. 8) that it did not effect a taking of SPC's claim because it did not "repudiate" the claim is faulty. The Executive Agreement extinguished all rights that SPC had in its claim, and thereby effected a taking of private property.[1] The Government's arrangement to distribute to SPC certain funds received pursuant to the Agreement cannot alter the fact of the taking, although it is an element in determining whether SPC has been fully compensated for the extinguishment. When the Government exercises its power of eminent domain to condemn property, the exercise is subject to judicial review to ensure that the property owner is justly compensated for the taking. Despite the Government's assertions of unfettered power over its citizens' international claims, it cannot explain why this class of property is not also entitled to Fifth Amendment protections.

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1. The Government's reliance (Opp. 9 & n.3, 18-20) on *Penn Central Transportation Corp. v. New York City*, 438 U.S. 104 (1978), is erroneous. Nothing in *Penn Central*, a regulation of property case, contradicts the principle of law enunciated in *Armstrong v. United States*, 364 U.S. 40 (1960), that governmental action that destroys all rights in private property is a taking.

The Government maintains (Opp. 11-12) that SPC is bound by the Government's exercise of the claims settlement power because the Government acted as the representative of SPC's interests. Although the Government admits that it is not a fiduciary in law, it claims that its power as "sole organ" of foreign relations enables it, immune from constitutional restraint, to extinguish private claims except, perhaps, in the event of corruption or bad faith. This naked assertion that the Executive can do as it chooses with private property when it acts in the field of foreign relations is bereft of judicial or scholarly sanction, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), and the Government does not attempt to supply any. It is this Court that may determine whether the exercise of the claims settlement power is exempt from the Just Compensation Clause.

The Government's further suggestion (Opp. 12-13) that SPC's Fifth Amendment claim is nothing more than a common law tort action is merely a dubious attempt to evade the constitutional issue. SPC has never contended that the Government was under any duty to advance SPC's interests in prosecuting its claim. Consideration of paramount national interests, such as those involved in the normalization of relations with China, may demand the sacrifice of private claims against foreign governments. The protections afforded by the Just Compensation Clause, however, cannot be bargained away. Takings pursuant to claims settlements may indeed occur less frequently than takings pursuant to condemnation of real property, but the Government does not explain why only the latter should therefore be fully compensable.

3. The Government's argument (*see* Opp. 7-8) that SPC's taking claim is not worthy of review because there is no historical precedent for such a challenge to the exercise of the claims settlement power is also without merit. Prior to World War II, the Government traditionally obtained claims settlements that compensated claimants for all, or virtually all, of

their certified losses, despite the fact that, because of the doctrine of absolute sovereign immunity, private claimants had practically no recourse to judicial forums to enforce their claims. *See* Pet. 7. When no such compensation was obtained, the Court of Claims held that the Government's extinguishment of private claims was subject to the Fifth Amendment. *Gray v. United States*, 21 Ct. Cl. 340 (1886).[2] The Government's attempt to distinguish *Gray* (Opp. 21) is unpersuasive for, while foreign governments in the post-World War II era may be less willing to acknowledge their obligations to compensate private American claimants, the claimants have significantly greater ability, independent of the Government's diplomatic intervention, to enforce those obligations. This enhanced enforceability is primarily due to modern restrictions on sovereign immunity and expansion of judicial authority to enforce arbitration agreements and arbitral awards. SPC had no opportunity to take advantage of these favorable legal developments because Government regulations blocked SPC from enforcing its claim until after conclusion of the Executive Agreement.

Contrary to the Government's assertion (Opp. 20-22), U.S. courts have continued to recognize, most recently in the Iranian claims litigation, that the Government's extinguishment of claims could be a taking. *See* Pet. 11, 13-15. None of the Iranian claims cases reached a final determination on the taking question because, as this Court noted in *Dames & Moore v. Regan*, 453 U.S. at 688-89, that question would not be timely raised until the Iranian claimants, failing to obtain adequate compensation from the claims tribunal established under the Algiers Accords, bring their Fifth Amendment grievance to the Claims Court. SPC's claim is thus the first to timely raise the issue of the Just Compensation Clause's applicability to Government exercise of the claims settlement

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2. Congressional payments to the French Spoliation claimants in *Gray* were "as of grace" (*see* Opp. 21) because the Court of Claims did not have jurisdiction over the claims; this Court, however, noted *Gray*'s conclusion of constitutional law with no indication of disapproval. *Blagge v. Balch*, 162 U.S. 439, 455 (1896).

power; judicial and scholarly recognition of Fifth Amendment limitations on uninhibited exercise of that power, however, is neither novel nor recent. *See* Pet. 9-15. The Government's response of disparaging relevant precedent and pointing to its own recent post-World War II claims settlement practice simply does not address the constitutional issue.[3] If the Government's primary defense to the taking question is that it is currently exercising the claims settlement power in the belief that the Fifth Amendment is not applicable, the question is certain to recur.

4. The Government's elaborate speculation (Opp. 13-18) asserting the worthlessness of SPC's claim is both irrelevant and incorrect. This effort to sidestep the taking question ignores the conclusion of the courts below that the value of SPC's claim could not be resolved on a summary judgment motion. *See* Pet. 2a, 12a. Moreover, the Government's assumptions concerning valuation are erroneous. Its assertion (Opp. 12) that SPC seeks to or must "second-guess" the Government and inquire into the circumstances and motivations of foreign policymaking in order to establish the worth of its claim is one such phantom. The worth of SPC's claim is not dependent on proof that the Government could have obtained more for extinguishing the claim. The valuation of the Government's own commission is probative of the claim's worth, as is the enforceability of SPC's claim independent of Government diplomatic intervention.

The Government's argument that SPC could not have enforced its claim is also unfounded. Having for three decades maintained blocking regulations prohibiting SPC from at-

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3. The Government erroneously cites (Opp. 8 n.2, 10) the Litvinov Assignment to demonstrate an historical pattern of claims settlement agreements extinguishing claims for which the eventual compensation paid was far less than the claims' value. The Litvinov Assignment did not extinguish any private American claims against the Soviet Union. *See* H.R. Rep. No. 624, 84th Cong., 1st Sess. 3 (1955), *reprinted in* [1955] U.S. Code Cong. & Ad. News 2745, 2747.

tempting to enforce its claim, the Government erroneously suggests (Opp. 14) that the claim's lack of enforceability is demonstrated by the fact that SPC did not undertake such enforcement. Furthermore, the Government's catalogue of obstacles to enforceability of claims against foreign governments (Opp. 14-16) ignores the circumstances of SPC's claim. In particular, it ignores the fact that the franchise agreement under which SPC operated in China contained a provision prohibiting expropriation and provided for disputes to be remedied through arbitration under the United States Arbitration Act, 9 U.S.C. §§ 1-14. The agreement to arbitrate constituted a waiver of sovereign immunity. 28 U.S.C. § 1605(a)(1); *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In addition, the Government's non-recognition of the People's Republic of China until 1979 would have precluded China from successfully asserting either sovereign immunity or the act of state doctrine. *Restatement (Second) of Foreign Relations Law of the United States* §§ 42(a), 107, Comment d (1965).

5. SPC's petition raises the question whether the Government's exercise of its power to extinguish private American claims against foreign states is a taking under the Fifth Amendment. There is no dispute concerning the importance of this question—the Government merely contends that the courts below acted correctly in excepting such Government extinguishments of property from the protection of the Just Compensation Clause. SPC submits, however, that there is no basis in precedent or policy for such an exception.

The Just Compensation Clause properly stands as a guardian of all private property, and it has not previously been suggested that the clause should not protect Americans' claims against foreign states. If in the pursuit of its foreign policy goals this nation chooses to eliminate certain citizens' private claims for less than their fair value, then the nation should assume its traditional Fifth Amendment obligation to justly compensate those citizens.

While the courts below have denied any obligation by the Government to compensate holders of extinguished private claims, the Government seems able to justify that denial only by reference to considerations of expediency. However, expediency is not the policy behind the Just Compensation Clause. Rather, that policy is fairness to all citizens, and such a policy will only be furthered by the application of the Fifth Amendment to this case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, it is respectfully prayed that this Court issue a writ of certiorari to review the judgment of the Court of Appeals.

Dated: September 27, 1985

Respectfully submitted,

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